

IN THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE, *ex rel.*
ROBERT E. COOPER, JR., ATTORNEY
GENERAL and REPORTER,

Plaintiff,

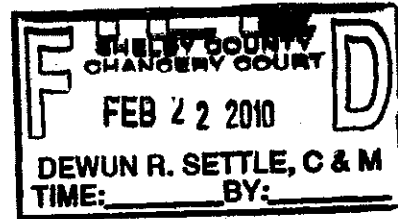
v.

TENNESSEE HOUSING PROTECTION
AGENCY, INC., a Tennessee non-profit
Corporation also doing business as
www.tnhpa.org; MARK JONES, individually
and doing business as TENNESSEE HOUSING
PROTECTION AGENCY, INC. and
www.tnhpa.org; and TED HOUSTON,
individually and doing business as
TENNESSEE HOUSING PROTECTION
AGENCY, INC. and www.tnhpa.org,

Defendants.

No. CH-08-1990-1

JURY DEMAND



PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT MARK JONES'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, the State of Tennessee, *ex rel.* the Attorney General and Reporter ("the State"), pursuant to Rule 10(i) of the Shelby County Local Rules of Practice and Rule 56 of the Tennessee Rules of Civil Procedure, submits this Response in Opposition to the Motion for Summary Judgment filed by Defendant Mark Jones ("Defendant Jones"). As discussed below, the State submits that the motion is not supported by facts or law and should therefore be denied.

II. PLAINTIFF'S TENN. R. CIV. P. 56.03 RESPONSE TO DEFENDANT JONES'S UNDISPUTED STATEMENT OF FACTS

Plaintiff, in accordance with Tenn. R. Civ. P. 56.03, responds to Defendant Jones's Undisputed Statement of Facts in Support of Motion for Summary Judgment as follows:

1. I am over eighteen (18) years of age and have personal knowledge of the facts contained in the Affidavit. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 1 are not disputed for purposes of the pending motion for summary judgment only.

2. I am the Executive Director of Tennessee Housing Protection Agency and one [of] the incorporators. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 2 are not disputed.

3. I had an idea that I wanted to help homeowners prevent their homes from foreclosure. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 3 are not disputed for purposes of the pending motion for summary judgment only.

4. I have 15 years of mortgage and real estate experience and I attended additional training classes to teach me the steps to take to help homeowners prevent their homes from going into foreclosure. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 4 are not disputed for purposes of the pending motion for summary judgment only.

5. I researched to determine were there any programs available to help homeowners prevent their homes from going into foreclosure. I also attempted to determine whether there were any federal or state grants that would help these homeowners. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 5 are not disputed for purposes of the pending motion for summary judgment only.

6. Upon completion of my training, I determined that I was going to establish Tennessee Mortgage Protection Agency, a non-profit organization that would help homeowners save their homes from foreclosure. I drafted the non-profit charter and the bylaws that would govern Tennessee Mortgage Protection Agency. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 6 are not disputed for purposes of the pending motion for summary judgment only.

7. On or about March 29, 2007, I traveled to the Secretary of State's office in Nashville to record the non-profit charter for Tennessee Mortgage Protection Agency. Upon attempting to record the charter I was told by the clerk that I needed to change the name of this company from Tennessee Mortgage Protection Agency to something else because of the federal regulations. I changed the name of this company to Tennessee Housing Protection Agency on the spot with the assistance of the clerk. The State of Tennessee granted Tennessee Housing Protection Agency corporation status. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in the first, second and fourth sentences in paragraph 7 are not disputed for purposes of the pending motion for summary judgment only. The facts in the third sentence in paragraph 7 pertaining to the "assistance of the clerk" are in dispute.

8. I paid 100.00 dollars to the State for the incorporation of Tennessee Housing Protection Agency. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 8 are not disputed.

9. I also obtained a tax identification number for the benefit of Tennessee Housing Protection Agency. An internet site was established for the benefit of Tennessee Housing Protection Agency, Inc. An advertisement was produced and aired on television for Tennessee

Housing Protection Agency. It was also stated during the advertisement that Tennessee Housing Protection Agency, Inc. is not affiliated with the state of Tennessee or any federal government. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 9 are not disputed for purposes of the pending motion for summary judgment only.

10. A bank account was established for the benefit of Tennessee Housing Protection Agency, Inc. and I became an employee Director of the corporation. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 10 are not disputed for purposes of the pending motion for summary judgment only.

11. Tennessee Housing Protection Agency, Inc. took on the responsibility of helping homeowners save their homes from foreclosure. The process included interviewing the homeowner at no cost to see if they could be helped. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 11 are in dispute. Despite Defendant Jones's assertions to the contrary, Plaintiff asserts that discovery is needed to determine whether Defendant Jones, Defendant Tennessee Housing Protection Agency, or Defendant Ted Houston have actually helped save consumers' homes from foreclosure.

12. Next, THPA would do a thorough analysis of the homeowner's income and expenses to determine if there was a program available to assist the homeowner. If it was determined that a program could be provided, THP A would prepare a financial packet along with a proposal asking the lender or servicer for certain terms to make the mortgage more affordable for the homeowner. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 12 are in dispute. Despite Defendant Jones's Affidavit, Plaintiff knows of no consumers for whom Defendant Jones, Defendant

Tennessee Housing Protection Agency, or Defendant Ted Houston have provided a “thorough analysis” or “prepare[d] a financial packet along with a proposal” for the lender. Plaintiff asserts that discovery is needed to determine this issue.

13. After submitting this information it would take on average about 60-90 days to reach an agreement with the lender or servicer over that 60-90 day period THPA would speak with the lender or servicer on a weekly basis. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 13 are in dispute. Other than Defendant Jones’s Affidavit, Defendants have not provided evidence that Defendants spoke “with the lender or servicer on a weekly basis.” Plaintiff asserts that discovery is needed to determine this issue.

14. Once an agreement was reached paperwork would be sent out to the client. THPA and the client would meet to make sure the paperwork matched the verbal terms that were provided over the phone. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 14 are in dispute. Plaintiff asserts that discovery is needed to determine whether Defendant Jones, Defendant Tennessee Housing Protection Agency, or Defendant Ted Houston have actually reached agreements with lenders to save consumers’ homes from foreclosure.

15. The client would then sign the paperwork and mail it to the lender. THPA would then verify that the documents were received by the lender or servicer once verified THPA would then close the file out. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 15 are in dispute. Despite Defendant Jones’s assertions to the contrary, Plaintiff asserts that discovery is needed to determine whether Defendant Jones, Defendant Tennessee Housing Protection Agency, or Defendant Ted

Houston had consumers sign paperwork to send to the lender nor have Defendants produced any of their consumers' files despite outstanding discovery requests to do so.

16. On or about June 10, 2008 Tennessee Housing Protection Agency, Inc. contacted the State of Tennessee (Tennessee Housing Development Agency) to pursue federal dollars for Tennessee Housing Protection Agency, Inc. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 16 are not disputed for purposes of the pending motion for summary judgment only.

17. The State officer told me I could not receive state money unless I was helping a certain number of people. When I told the Tennessee Housing Development Agency that I was meeting the minimum requirements, she responded there was no way and the next thing I know I was being sued by the State of Tennessee. Exhibit A, (Affidavit of Mark Jones)

RESPONSE: The facts in paragraph 17 are in dispute.

18. The State of Tennessee brought this lawsuit against Tennessee Housing Protection Agency, Inc., Mark Jones individually and Ted Houston individually for violating the Tennessee Consumer Protection Act of 1977 for engaging in unfair and deceptive acts and practices in connection with offering and charging for foreclosure rescue schemes to consumers who are facing foreclosure in this current mortgage crisis. The State further contends that the Defendants engaged in unlawful conduct in the way they advertise, offer, and provide "foreclosure rescue" services. Complaint ¶ 9

RESPONSE: The facts in paragraph 18 are not disputed.

19. Defendants offer services in a manner that is misleading and deceptive to consumers. Basically, Defendants represent to consumers that they will keep a consumer's home out of foreclosure but fail to deliver as promised. Complaint ¶ 9

RESPONSE: The facts in paragraph 19 are not disputed.

20. Upon information and belief, Defendant THPA, Defendant Mark Jones, and Defendant Ted Houston have operated, controlled and conducted business via the Internet website, www.tnhpa.org. Complaint ¶ 7

RESPONSE: The facts in paragraph 20 are not disputed.

21. As a preface, the State of Tennessee generally alleges that Defendants have engaged in unlawful conduct in the way they advertise, offer, and provide “foreclosure rescue” services. Defendants offer services in a manner that is misleading and deceptive to consumers. Basically, Defendants represent to consumers that they will keep a consumer’s home out of foreclosure but fail to deliver as promised. Complaint ¶ 9

RESPONSE: The facts in paragraph 21 are not disputed.

22. Defendants advertise that they operate a non-profit organization called “Tennessee Housing Protection Agency” which purports to help consumers avoid foreclosure when they have fallen behind in their mortgage payments. Complaint ¶ 14

RESPONSE: The facts in paragraph 22 are not disputed.

23. Defendant THPA is not a state government agency nor affiliated with the State of Tennessee. Complaint ¶ 15

RESPONSE: The facts in paragraph 23 are not disputed.

24. Defendants’ company name, Tennessee Housing Protection Agency, and its acronym, “THPA,” sound almost identical to Tennessee Housing Development Agency and its acronym, “THDA,” which is a legitimate agency created by Tennessee law and authorized to assist consumers with finding safe, sound, affordable housing solutions, assists[sic] consumers with [a] a free rental housing locator, and train a network of certified counselors who in fact offer free foreclosure counseling to consumers. Complaint ¶ 16

RESPONSE: The facts in paragraph 24 are not disputed.

25. Twenty-four seconds into the thirty second commercial a faint statement in relatively small font appears on the screen that states, "A non-profit organization not affiliated with the State of Tennessee." This statement is very difficult to read and due to the background screen behind it, the word "not" is particularly difficult to read. Complaint ¶ 26

RESPONSE: The facts in paragraph 25 are not disputed.

III. PLAINTIFF'S TENN. R. CIV. P. 56.03 STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiff, in accordance with Tenn. R. Civ. P. 56.03, submits the following additional material facts:

1. Defendant Jones is also the Founder/Chairman and President of Defendant Tennessee Housing Protection Agency ("THPA"). *See* Defendants Mark Jones and Tennessee Housing Protection Agency, Inc. Answer to Plaintiff State of Tennessee Et. Al. Complaint for Permanent Injunction and Other Relief ("Jones Answer"), ¶ 5.
2. As Executive Director, Defendant Jones is responsible for the daily operations at Tennessee Housing Protection Agency. *See* Defendant Mark Jones Response to State of Tennessee's First Set of Interrogatories ("Jones Response to Interrogatories"), ¶ 3 (filed January 25, 2010).
3. As Executive Director Defendant Jones described his day-to-day activities at Tennessee Housing Protection Agency as meeting and assisting homeowners in lowering their monthly mortgage payments. *See* Jones Response to Interrogatories, ¶ 4.
4. As Executive Director, Defendant Jones admits that he advertised his services via the Internet at www.tnhpa.org. *See* Jones Answer, ¶ 19.

5. As Executive Director, Defendant Jones starred in a television commercial advertising the foreclosure rescue services of Tennessee Housing Protection Agency. *See* Jones Answer, ¶ 24.

6. As Executive Director, Defendant Jones placed a copy of this television commercial for consumers to see on the homepage of Tennessee Housing Protection Agency's website, www.tnhpa.org. *See* Jones Answer, ¶ 23.

7. As Executive Director, Defendant Jones promoted his foreclosure rescue services by use of a business card. *See* Jones Answer, ¶ 31.

8. As Executive Director, Defendant Jones did not disclose that Tennessee Housing Protection Agency was not affiliated with the State of Tennessee on his business card. *See* Jones Answer, ¶ 25.

9. As Executive Director, Defendant Jones appeared on the Channel 13 News in Memphis on at least two occasions promoting his foreclosure rescue services company, Tennessee Housing Protection Agency. *See* Jones Answer, ¶¶ 33, 34.

10. As Executive Director, Defendant Jones did not disclose that he and his company were not affiliated with the State of Tennessee or that he and his company charge a fee for services. *See* Jones Answer, ¶ 34.

11. As President of Tennessee Housing Protection Agency, Defendant Jones filed a pro se answer to the State's Complaint on behalf of himself individually and on behalf of the company. *See* Jones Answer.

12. Defendant Jones is listed as the Founder/Chairman of Tennessee Housing Protection Agency in Part V-A of Tennessee Housing Protection Agency's 2007 IRS Form 990. *See* Affidavit of Nathan Casey ("Casey Affidavit"), Exhibit A.

13. As Chairman of Tennessee Housing Protection Agency, Defendant Jones stated on line 91a of its 2007 IRS Form 990 that the books of Tennessee Housing Protection Agency are in his care. *See* Casey Affidavit, Ex. A.

14. As Chairman of Tennessee Housing Protection Agency, Defendant Jones signed the 2007 IRS Form 990 as the designated officer and preparer of the form. *See* Casey Affidavit, Ex. A.

15. The Division of Business Services of the Tennessee Secretary of State's Office engages in ministerial filing duties and does make any legal conclusions or provide advice regarding proposed entity names. *See* Affidavit of Nathan Burton, Director of Division of Business Services ("Burton Affidavit"), ¶¶ 10-11.

16. As Executive Director of Defendant Tennessee Housing Protection Agency, Defendant Jones directly participated in the foreclosure rescue services that Defendants purportedly provided to consumers. *See* Affidavit of Demetira Ingram ("Ingram Affidavit"), ¶¶ 31-32 (Copy filed in the record; original has been or will be filed in *Ingram v. Tennessee Housing Protection Agency, Inc., Mark Jones, et al.*, Shelby Co. Chancery Case No. CH-08-1985-1); Affidavit of Pamela Pugh ("Pugh Affidavit") (Copy filed in the record; original has been or will be filed in *Pugh v. Tennessee Housing Protection Agency, Inc., Mark Jones, et al.*, Shelby Co. Chancery Case No. CH-08-1983-2), ¶¶ 8-13; Affidavit of Linda Ray ("Ray Affidavit"), ¶¶ 14-15 (Copy filed in the record; original has been or will be filed in *Sims v. Tennessee Housing Protection Agency, Inc., Mark Jones, et al.*, Shelby Co. Chancery Case No. CH-08-1988-2); Affidavit of Cathy Simms ("Simms Affidavit"), ¶¶ 6-9, 12, 16, 18-19, 24, 26-28 (Copy filed in the record; original has been or will be filed in *Simms v. Tennessee Housing Protection Agency, Inc., Mark Jones, et al.*, Shelby Co. Chancery Case No. CH-08-1982-3).

17. As Executive Director of Defendant Tennessee Housing Protection Agency, Defendant Jones also had knowledge of Defendants' activities in purportedly providing foreclosure rescue services to consumers. *See* Ingram Affidavit, ¶ 32; Ray Affidavit, ¶¶ 14-15.

IV. ARGUMENT

In his motion for summary judgment, Defendant Jones presents two arguments. First, Defendant Jones contends that because Defendant Tennessee Housing Protection Agency is a Tennessee corporation, Defendant Jones is exempt from any individual liability for the violations alleged in the State's Complaint. Second, Defendant Jones contends that the affirmative defense of equitable estoppel should bar the State from pursuing its law enforcement action against him in his individual capacity. As discussed below, both of Defendant Jones's arguments lack merit, and this Court should therefore deny his motion for summary judgment.

A. Standard of Review for Summary Judgment.

In accordance with Tenn. R. Civ. P. 56.04, summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The issues at the heart of a Tennessee court's evaluation of a motion for summary judgment are: "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (emphasis in original).

If a material fact is in dispute, then a court must "determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03 [now 56.04] [T]he test for a 'genuine issue' is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.* at 215. In making the determination as to whether there is a genuine issue

for trial, the court must view the evidence in the light most favorable to the non-moving party and allow all reasonable inferences in favor of the non-moving party. *Id.*

The *Byrd* standard for summary judgment has recently been clarified by the Tennessee Supreme Court in *Hannan v. Alltel Publishing, Inc.*, 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008). As stated in Tenn. R. Civ. P. 56.04, summary judgment is still only appropriate when the moving party can show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hannan*, 270 S.W.3d at 5 (citing *Byrd*, 847 S.W.2d at 214). The Supreme Court in *Hannan* clarified that the moving party has the burden to prove both of these factors to obtain a summary judgment. *Id.* Only if the moving party makes a properly supported motion does the burden of production shift to the nonmoving party to show that a genuine issue of material fact exists. *Id.* (citing *Byrd*, 847 S.W.2d at 215).

The Supreme Court reversed summary judgment in *Hannan* and held that:

[i]n Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

Id. at 8-9. Both of these methods require the moving party to put forth something more than just an assertion that the nonmoving party has no evidence. *Martin*, 271 S.W.3d at 83-84 (citing *Byrd*, 847 S.W.2d at 215). The Supreme Court in *Martin* further explained that the presentation of evidence that raises doubt about the non-moving party's ability to prove his or her claim is also insufficient. *Id.* at 84 (citing *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

The Supreme Court held that "to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the

nonmoving party.” *Id.* See also *Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). “If the moving party is unable to make the required showing, then its motion for summary judgment must fail.” *Id.* (citing *Byrd*, 847 S.W.2d at 215).

The State respectfully submits that Defendant Jones has failed to meet the burden for summary judgment.

B. Defendant Jones has failed to negate an essential element of the State’s claim.

The motion for summary judgment filed by Defendant Jones must fail because he has not negated an essential element of the State’s claim. Defendant Jones has unsuccessfully attempted to shift the burden to the State, the nonmoving party, by asserting his undisputed statement of facts and what appear to be two affirmative defenses. *Hannan*, 270 S.W.3d at 9, n.6. As discussed below, these defenses, however, are not applicable to the State’s consumer protection law enforcement action.

The State asserts and respectfully requests that the Court find that Defendant Jones failed to meet his burden to negate an essential element of the State’s claim. If the Court, however, determines that Defendant Jones has met his burden, then Tennessee case law states that the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *Martin*, 271 S.W.3d at 84; *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

(1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

Martin, 271 S.W.3d at 84; *McCarley*, 960 S.W.2d at 588; accord *Byrd*, 847 S.W.2d at 215 n. 6.

The Supreme Court has stated that the nonmoving party’s evidence must be accepted as true, and

any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *Martin*, 271 S.W.3d at 84; *McCarley*, 960 S.W.2d at 588.

C. Defendant Jones is not insulated from individual liability because Tennessee Housing Protection Agency is a corporation.

In his first argument, Defendant Jones incorrectly contends that he is not subject to individual liability as the Executive Director for the violations alleged by the State because Defendant Tennessee Housing Protection Agency is a properly established Tennessee corporation. Defendant Jones suggests that the reason for his insulation from individual liability is that the State has not produced sufficient evidence to justify dissolving the “corporate veil” that he is attempting to hide behind.

1. Defendant Jones erroneously relies on contract law instead of consumer protection case law.

To support his argument, Defendant Jones relies upon *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991). *Schlater* involved a private action by a lessor against a corporation and its principals seeking to recover on the corporation’s note to the lessor for improvements made by the lessor to the leasehold, unpaid rent, and attorneys’ fees. *Id.* In other words, *Schlater* was a breach of contract case between private parties. The State did not, however, bring a breach of contract case against Defendant Jones. Rather, the State has brought a law enforcement action for violations of the Tennessee Consumer Protection Act (“TCPA”), Tenn. Code Ann. § 47-18-101 *et seq.*, and violations of the Unauthorized Practice and Improper Conduct statutes (“unauthorized practice of law”), Tenn. Code Ann. § 23-3-101 *et seq.*

Defendant Jones also relies upon an unreported Tennessee Court of Appeals case, *Emergicare Consultants, Inc. v. Woolbright*, No. W1998-00659-COA-R3-CV, 2000 WL 1897350, at *2 (Tenn. Ct. App. Dec. 29, 2000), *perm. app. denied* (Tenn. May 14, 2001) (attached as Appendix A), to support this argument regarding “corporate veil” protection. Like

Schlater, Emergicare Consultants is a breach of contract case between two private parties. Emergicare Consultants entered into a contract with Medic Ambulance Service whereby Emergicare Consultants was to manage Medic while preparing Medic for a sale. *Id.* at *1. Emergicare Consultants, the plaintiff in this matter, sought to pierce the corporate veil to impose personal liability on Medic's president, the defendant, to recover a debt due under the contract. *Id.* Once again, Defendant Jones relies on a case that is not applicable to the State's law enforcement proceeding and in fact supports the State's position regarding the purpose of "piercing the corporate veil." The *Emergicare Consultants* court stated that "[c]orporate veils are pierced when the corporation is liable for a debt but it is without funds due to some misconduct on the part of the officers and directors." *Id.* at *2, *4. *See also Anderson v. Durbin*, 740 S.W.2d 417, 418 (Tenn. Ct. App. 1987).

As the two cases on which Defendant Jones relies have shown, the notion of "piercing the corporate veil" is for a party to assert when a corporation owes a debt and the party is trying to get the corporate officer to pay such debt. "Piercing the corporate veil" is not an affirmative defense or other type of protection that Defendant Jones can attempt to hide behind in a law enforcement action brought by the State regarding allegations of unfair and deceptive acts or practices under the Tennessee Consumer Protection Act and allegations of the unauthorized practice of law. Not only is this argument misplaced substantively, procedurally it is being brought by the wrong party to this action at the wrong time. The Tennessee Supreme Court has stated that "[o]rdinarily, a determination of whether to pierce the corporate veil is not appropriate for summary judgment." *Mike v. Po Group, Inc.*, 937 S.W.2d 790, 795 (Tenn. 1996). Defendant Jones has failed to either: (1) affirmatively negate an essential element of the State's Complaint; or (2) show that the State cannot prove an essential element of its Complaint at trial. Therefore, Defendant Jones failed to carry his burden of establishing that he is entitled to judgment as a

matter of law on this issue of individual liability and the burden of production should not shift to the State.

2. Tennessee case law reveals that individual defendants are liable for unfair and deceptive acts or practices.

Individual defendants are liable under the Tennessee Consumer Protection Act for unfair or deceptive acts and practices undertaken in the name of a corporation. *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585 (Tenn. Ct. App. 1980). The *Brungard* court upheld the imposition of treble damages under the Tennessee Consumer Protection Act against the president of a corporation, who “created [the corporation] and its method of attracting customers,” and against a sales agent who made misrepresentations on behalf of the corporation. *Id.* at 590-91. Analogizing to tort law, the court held that the sales agent could not “escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer.” *Id.* at 590.

The *Brungard* court also held that the president of the corporation was liable under the Tennessee Consumer Protection Act, based on the principle that “[a]n officer or director of a corporation who commits or participates in the commission of a tort is likewise liable to third parties regardless of the liability of a corporation.” *Id.* at 590-91 (citing *Cooper v. Cordova Sand and Gravel, Inc.*, 485 S.W.2d 261 (Tenn. Ct. App. 1971)). Furthermore, a corporate individual is liable to third parties who were injured by the individual’s conduct, although the individual’s direct involvement in the fraudulent act is not required to find him liable. *Id.* at 591.

3. Federal Trade Commission case law also finds that individual defendants are liable for unfair and deceptive acts or practices.

The *Brungard* holding is consistent with Federal Trade Commission (“FTC”) case law, which the Tennessee Consumer Protection Act states Tennessee courts shall follow. Tenn. Code Ann. § 47-18-115 expressly mandates that the Tennessee Consumer Protection Act “shall be

interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to §5(A)(1) of the Federal Trade Commission Act.” Tenn. Code Ann. § 47-18-115. *See also Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005); *Ganzevoort v. Russell*, 949 S.W.2d 293, 297, 298 (Tenn. 1997). Tennessee courts uphold this important legislative mandate. *See Tucker*, 180 S.W.3d at 116.

FTC case law has held that individual defendants are liable for the unfair or deceptive practices of a corporation if the individuals either (1) participated directly in the practices or acts, or (2) had the authority to control the business entity and had some knowledge of the practices. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). Authority to control a corporation is “evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Amy Travel Service*, 875 F.2d at 573.

4. Applying the law to the current case demonstrates that Defendant Jones’s motion must fail.

Applying all of the above principles to this matter, it becomes clear that the law does allow for individual liability even for those acting on behalf of business entities. Defendant Jones’s blanket argument that he may not be held liable for violations of the Tennessee Consumer Protection Act because his company, Defendant Tennessee Housing Protection Agency, was a registered corporation, does not comport with the myriad of cases cited above that support the exact opposite proposition. The State asserts that Defendant Mark Jones both (1) participated directly in the unfair or deceptive practices or acts alleged by the State, and (2) had the authority to control the business entity and had some knowledge of the practices.

Furthermore, the facts of this matter plainly suggest that individual liability would be entirely appropriate given Defendant Jones’s role. By his admission, Defendant Jones formulated the idea for creating Defendant Tennessee Housing Protection Agency and took the

necessary steps to organize the business. *See* Defendant Mark Jones' Undisputed Statement of Facts ("Jones SOF"), ¶¶ 3, 6. Defendant Jones drafted the documents necessary to form his company. *See* Jones SOF, ¶ 6. Defendant Jones took further steps to organize his company, including registering it with the Tennessee Secretary of State's office and obtaining a federal tax identification number for the company. *See* Jones SOF, ¶¶ 7-9.

Defendant Jones has held various leadership roles at Tennessee Housing Protection Agency, had the authority to control the business entity and had some knowledge of the unfair or deceptive conduct alleged in the State's Complaint. Defendant Jones is not only the Founder/Chairman and President of Defendant Tennessee Housing Protection Agency, but he also worked as the Executive Director of the company. *See* Jones Answer, ¶ 5; Jones Response to Interrogatories, ¶ 3; Casey Affidavit, Ex. A. As Executive Director, Defendant Jones admits that he is responsible for the daily operations at Tennessee Housing Protection Agency. *See* Jones Response to Interrogatories, ¶ 3. As President of Tennessee Housing Protection Agency, Defendant Jones filed a pro se answer to the State's Complaint on behalf of himself individually and on behalf of the company. *See* Jones Answer. As Chairman of Tennessee Housing Protection Agency, Defendant Jones stated on line 91a of its 2007 IRS Form 990 that the books of Tennessee Housing Protection Agency are in his care. *See* Casey Affidavit, Ex. A. As Chairman of Tennessee Housing Protection Agency, Defendant Jones signed the 2007 IRS Form 990 as the designated officer and preparer of the form. *See* Casey Affidavit, Ex. A.

Defendant Jones readily admits that had knowledge of the daily activities at Tennessee Housing Protection Agency. Defendant Jones states in his sworn affidavit that he has "personal knowledge of the facts contained in the Affidavit." *See* Jones Affidavit, ¶ 1. The State notes that starting with paragraph 9 of his affidavit, Defendant Jones switches from making first person "I" statements to swearing to what "THPA" did. *See* Jones Affidavit, ¶¶ 9-16. Defendant Jones

details his knowledge about advertising that was conducted by Tennessee Housing Protection Agency. *See* Jones Affidavit, ¶ 9. Furthermore, Defendant Jones then makes a sworn statement to the daily activities of Tennessee Housing Protection Agency. *See* Jones Affidavit, ¶¶ 11-15. For example, Defendant Jones avers that “THPA and the client would meet...” when obviously a human being at Tennessee Housing Protection Agency such as Defendant Jones had to actually meet with any consumers. *See* Jones Affidavit, ¶ 14. Therefore, Defendant Jones readily meets one of the requirements for individual liability as he admits in his own affidavit that he had personal knowledge of the activities at Tennessee Housing Protection Agency that are the subject of the State’s Complaint.

Defendant Jones also participated directly in the unfair or deceptive conduct alleged by the State regarding the foreclosure rescue services that Defendants promoted, advertised or offered to homeowners. As Executive Director, Defendant Jones admits that he advertised his services via the Internet at www.tnhpa.org. *See* Jones Answer, ¶ 19. As Executive Director, Defendant Jones starred in a television commercial advertising the foreclosure rescue services of Tennessee Housing Protection Agency. *See* Jones Answer, ¶ 24. As Executive Director, Defendant Jones placed a copy of this television commercial for consumers to see on the homepage of Tennessee Housing Protection Agency’s website, www.tnhpa.org. *See* Jones Answer, ¶ 23. As Executive Director, Defendant Jones promoted his foreclosure rescue services by use of a business card. *See* Jones Answer, ¶ 31. Furthermore, as Executive Director, Defendant Jones appeared on the Channel 13 News in Memphis on at least two occasions promoting his foreclosure rescue services company, Tennessee Housing Protection Agency. *See* Jones Answer, ¶¶ 33, 34.

Defendant Jones also participated directly in the unfair or deceptive conduct alleged by the State regarding the foreclosure rescue services allegedly provided to homeowners facing

foreclosure. As Executive Director of Tennessee Housing Protection Agency, Defendant Jones described his day-to-day activities at Tennessee Housing Protection Agency as meeting and assisting homeowners in lowering their monthly mortgage payments. *See* Jones Response to Interrogatories, ¶ 4. As Executive Director, Defendant Jones directly participated in the foreclosure rescue services that Defendants purportedly provided to consumers. *See* Ingram Affidavit, ¶¶ 31-32; Pugh Affidavit, ¶¶ 8-13; Ray Affidavit, ¶¶ 14-15; Simms Affidavit, ¶¶ 6-9, 12, 16, 18-19, 24, 26-28. For example, when Cathy Simms was seeking assistance to save her home from foreclosure, she contacted Defendant Jones and proceeded to work with him directly. *See* Simms Affidavit, ¶¶ 6-9, 12, 16, 18-19, 24, 26-28. Despite Defendant Jones's promises to save Ms. Simms's home, Defendant Jones failed to provide any services to save her home from foreclosure. *See* Simms Affidavit, ¶¶ 15, 16, 29.

As Executive Director of Defendant Tennessee Housing Protection Agency, Defendant Jones also had knowledge of Defendants' activities in purportedly providing foreclosure rescue services to consumers and the authority to control the unfair or deceptive conduct. *See* Ingram Affidavit, ¶ 32; Ray Affidavit, ¶¶ 14-15. For example, after Defendant Ted Houston was unable to secure a loan modification for Demetira Ingram, she spoke to Defendant Jones who told her "to stay really close to Ted Houston and that Mr. Houston could take care of [her]." *See* Ingram Affidavit, ¶ 32. Unfortunately none of the Defendants were able to save Ms. Ingram's home from foreclosure despite their promises to the contrary and acceptance of payment to provide such services.

Finally, Defendant Jones has readily admitted that he has engaged in the unfair or deceptive misconduct alleged in the State's Complaint. Defendant Jones has moved that the following facts are undisputed and included them as such in his Undisputed Statement of Facts:

- The State further contends that the Defendants engaged in unlawful conduct in the way they advertise, offer, and provide “foreclosure rescue” services. *See* Jones SOF, ¶ 18.
- Defendants offer services in a manner that is misleading and deceptive to consumers. Basically, Defendants represent to consumers that they will keep a consumer’s home out of foreclosure but fail to deliver as promised. *See* Jones SOF, ¶ 19.
- Upon information and belief, Defendant THPA, Defendant Mark Jones, and Defendant Ted Houston have operated, controlled and conducted business via the Internet website, www.tnhpa.org. *See* Jones SOF, ¶ 20.
- As a preface, the State of Tennessee generally alleges that Defendants have engaged in unlawful conduct in the way they advertise, offer, and provide “foreclosure rescue” services. Defendants offer services in a manner that is misleading and deceptive to consumers. Basically, Defendants represent to consumers that they will keep a consumer’s home out of foreclosure but fail to deliver as promised. *See* Jones SOF, ¶ 21.

The State agrees with Defendant Jones that these statements are undisputed.

Accordingly, the State submits that the law supports liability for individuals acting on behalf of corporations and that the facts outlined above suggest that individual liability is appropriate for Defendant Jones. Given these circumstances, Defendant Jones has failed to establish that there exists no genuine issue of material fact as to whether he may be individually liable for violations alleged in the State’s Complaint.

D. Defendant Jones has failed to establish that the doctrine of equitable estoppel is applicable in this matter.

In his second argument, Defendant Jones contends that the claims brought by the State in its Complaint are barred by the doctrine of equitable estoppel. Defendant Jones claims that the State “cannot contend that Mark Jones attempted to mislead consumer[s] with the name Tennessee Housing Protection Agency, Inc. is [sic] when it approved the name and it accepted gratuity from the Defendant Mark Jones for the name Tennessee Housing Protection Agency, Inc.” Defendant Jones is essentially claiming that he relied upon the State of Tennessee

accepting this name and a filing fee and, therefore, the State cannot then allege violations of the Tennessee Consumer Protection Act for using a misleading or “copycat” name similar to the agency authorized by Tennessee law, Tennessee Housing Development Agency.

1. Defendant Jones erroneously relies on a contract affirmative defense.

The only case that Defendant Jones offers in support of his equitable estoppel defense is *McClure v. Wade*, 235 S.W.2d 835 (Tenn. Ct. App. 1950). Defendant Jones uses this case solely to present the “essential elements of an equitable estoppel” as related to the party estopped and the party claiming estoppel, which is a citation from American Jurisprudence. *Id.* at 842. This case was an action by a decedent’s daughter to contest a will and involved the issue of whether the daughter could be estopped from contesting this will. *Id.* at 835. Once again, the case proffered by Defendant Jones is essentially a contract case between private parties, not a law enforcement action by the government.

2. Tennessee law states that equitable estoppel is generally not applicable to actions brought by the government.

The Tennessee Supreme Court has stated that “[t]he rule in this State is that the doctrine of estoppel generally does not apply to the acts of public officials or public agencies.” *Bledsoe Co. v. McReynolds*, 703 S.W.2d 123, 124 (Tenn. 1985). Likewise, [p]ublic agencies are not subject to equitable estoppel or estoppel in pais to the same extent as private parties and very exceptional circumstances are required to invoke the doctrine against the State and its governmental subdivisions.” *Id.* Defendant Mark Jones has only pointed to actions that merely amount to the ministerial filing duties of a State agency in his affidavit; he has not asserted any exceptional circumstances in his motion to warrant this equitable defense to be invoked against the State. Not only does equitable estoppel generally not apply to the State but it also is not appropriate in a law enforcement action brought by the State to enforce the Tennessee Consumer Protection Act.

3. State and FTC case law recognizes that contract defenses such as equitable estoppel do not apply to government consumer protection enforcement actions.

Well-settled Tennessee law has recognized that contract defenses do not apply in a TCPA case. *See, e.g., Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992); *Tucker*, 180 S.W.3d at 115. The reason for this rule is because under the TCPA, the legal inquiry focuses on whether defendants engaged in deception, not whether a contract was breached. Thus, “[t]he numerous defenses that are available to the defendant in a common-law fraud case are simply not available to the defendant in a TCPA case.” *Tucker*, 180 S.W.3d at 115.

Courts also universally recognize that the defenses which may be available in an action by private parties may not be raised to defend against a consumer protection law enforcement action brought by the Attorney General. *See, e.g., People v. Pacific Land Research Co.*, 569 P.2d 125, 131 (Cal. 1977). *Cf. State v. Brotherhood Bank and Trust Co.*, 649 P.2d 419, 424 (Kan. App. 1982) (“[T]here is no express provision in the act subjecting the state to all defenses which would be available against a private consumer.”).

As a general rule, equitable defenses such as estoppel may not be asserted against the government when it is acting in its sovereign capacity to enforce a public right or protect the public interest. *U. S. v. Reader's Digest Ass'n, Inc.*, 464 F.Supp. 1037, 1043 (D. Del. 1978) (“The equitable defenses of laches, waiver and estoppel have no application here, because they are based on actions taken in the public interest by [the FTC]”). While the State has already set forth a number of reasons confirming that such an affirmative defense does not apply in this case, this defense is also inapplicable because it may not be asserted against the State when it is acting in its role as sovereign.

The rule that equitable defenses do not apply in law enforcement proceedings has been regularly recognized and applied in state and federal consumer protection and deceptive trade enforcement cases. Thus, courts have universally held that estoppel will not bar a consumer

protection or deceptive trade enforcement case. *Double-Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 55-56 (4th Cir. 1950).

4. Applying the law to the current case demonstrates that Defendant Jones's motion must fail.

Defendant Jones basically contends that he lacked the knowledge that the name of his company, Tennessee Housing Protection Agency, might be misleading to consumers, and he relied upon the Secretary of State's acceptance of this name and a filing fee to his detriment. The employees of the Division of Business Services of the Tennessee Secretary of State's Office have been informed to follow certain procedures when processing paperwork for a new business entity. *See* Burton Affidavit, ¶ 10. Without prior written approval from the Tennessee Department of Financial Institutions, the Division of Business Services cannot approve an entity name that includes any of the following words: bank, banks, banking, mortgage or trust. *Id.*, ¶ 7. These employees then check to see that the requested entity name available and is distinguishable from other business entities on file. *Id.*, ¶ 9. Therefore, the employee that Defendant Jones encountered was following procedure when registering Tennessee Housing Protection Agency as a Tennessee Corporation. Checking the availability of a name and accepting a filing fee are ministerial filing duties. *Id.*, ¶ 10. In performing its ministerial filing duties, the Division of Business Services does not make any legal conclusions or provide advice regarding proposed entity names. *Id.*, ¶ 11. Defendant Jones has not offered any evidence of special circumstances to persuade this Court to invoke the doctrine of equitable estoppel against the State of Tennessee.

Defendant Jones's argument here lacks merit on the law and on the facts asserted. Well-established Tennessee case law bars defendants from raising equitable estoppel as an affirmative defense to an action by a government agency. Furthermore, the doctrine of equitable estoppel is not appropriate in consumer protection law enforcement actions as evidenced by FTC case law.

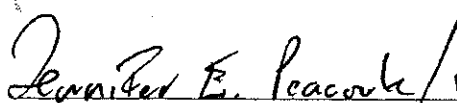
Finally, Defendant Jones cannot rely on the ministerial filing functions of a State agency regarding a business name as grounds to escape individual liability for his and his company's actions. Defendant Jones has again failed to either: (1) affirmatively negate an essential element of the State's Complaint; or (2) show that the State cannot prove an essential element of its Complaint at trial. Therefore, Defendant Jones failed to carry his burden of establishing that he is entitled to judgment as a matter of law by raising the defense of equitable estoppel and the burden of production should not shift to the State.

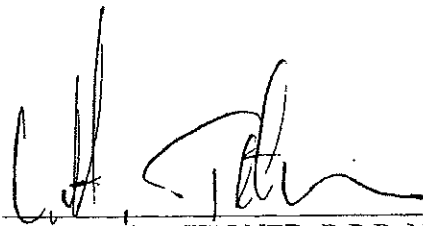
V. CONCLUSION

For all the foregoing reasons, the State submits that Defendant Jones has failed to carry his burden of establishing that there are no genuine issues of fact in dispute and that he is entitled to judgment as a matter of law. Accordingly, the State requests that this Court deny Defendant Jones's motion for summary judgment.

Respectfully submitted,

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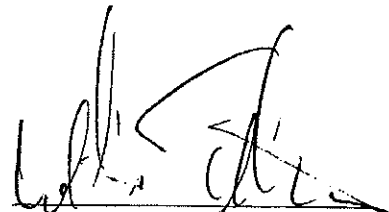
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via U.S Mail on February 22, 2010 to the following:

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